

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
**CIVIL TRIAL DIVISION**

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| ARNOLD LEVIN, ESQUIRE and<br>LEVIN, FISHBEIN, SEDRAN, & BERMAN,<br>Plaintiffs, | : May Term, 2001<br>: No. 0374 |
| v.   | : Commerce Case Program        |
| WENDELL H. GAUTHIER, ESQUIRE, <u>etal.</u><br>Defendants.                      | : Control No. 090391           |

**O R D E R**

AND NOW, this 14th day of January 2002, upon consideration of the Preliminary Objections of William H. Gauthier, Esquire etal. (“defendants”) to the Complaint of plaintiffs, Arnold Levin, Esquire, etal. (“plaintiffs”), the response in opposition, the respective Memoranda and all matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** and **DECREED** that the Preliminary Objections are **Overruled**.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**



## DISCUSSION

### I. This Court Does Not Lack Subject Matter Jurisdiction.

Defendants first urge that this court lacks jurisdiction over the subject matter of this action because the Agreement provides for a dispute resolution process which would be “final, binding, and non-appealable.” Def’s P.O. at ¶10. Plaintiffs, however, argue that such “agreements for alternate dispute resolution of a matter do not result in *per se* denials of Court review of the performance by the arbitrators.” Pl’s Reply Mem. of Law to Def’s P.O. at 26. Based on the pleadings presented, this court agrees with plaintiffs.

As a general rule in Pennsylvania, if a contract provides that a case be submitted to arbitration, and “that the award shall be final and conclusive, and that neither party shall have a right to appeal or file exceptions to it; the parties are concluded by their agreement, and have withdrawn from the court its power to rectify a mistake of fact on the part of the referees, on exceptions filed to their award.” McCahan v. Reamey, 33 Pa. 535, 9 Casey 535 (1859). Furthermore “if the parties to a contract provide that any dispute which may arise between them in reference to the subject matter of the contract shall be determined by a person therein named, whose decision shall be final, no action can be sustained at law in reference to matters embraced in the prospective submission.” Lauman v. Young, 31 Pa. 306, 1858 WL 7899 (Pa.). Moreover, the arbitrators are the final judges of both law and fact, and an arbitration award is not subject to reversal for a mistake of either. Prudential Prop. & Cas. Ins. Co. v. Stein, 453 Pa.Super. 227, 683 A.2d 683, 684 (1996).

However, in limited instances, judicial review of an arbitration award is available.<sup>1</sup> “The award of an arbitrator . . . may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.” Gargano v. Terminix International Co., 784 A.2d 188, 193 (Pa.Super 2001) (citations omitted). “[A]n ‘irregularity’ will not be found simply upon a showing that an incorrect result was reached”. An irregularity which requires reversal of a common law arbitration award refers to the process employed in reaching the result of the arbitration, not to the result itself.” Gwin Engineers, Inc. v. Cricket Club Estates Development Group, 382 Pa.Super. 533, 535, 555 A.2d 1328, 1329 (1989) (citations omitted).

Admittedly, each of the member firms in the Plaintiffs’ Litigation Committee (“PLC”) unanimously agreed that the Agreement would be the “sole and exclusive source of the remedies” and “final, binding and non-appealable.” Def.’s P.O. at ¶ 7. However, in addition to this alternate dispute resolution, the PLC also agreed upon the process in which the fees were to be distributed.<sup>2</sup> It is this process that is the gravamen

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<sup>1</sup>Although the clause in the Agreement at issue is not a traditional arbitration clause, in that an independent third-party was not here involved in the decision making process, the standard of review applicable to common law arbitration is instructive. Absent an express statement in the arbitration agreement, or a subsequent agreement by the parties which calls for the application of the Uniform Arbitration Act (UAA) statutory provisions, an agreement to arbitrate is conclusively presumed to be at common law and subject to the common law provisions of the arbitration statute. Sage v. Greenspan, 765 A.2d 1139 (Pa.Super.Ct 2000) (citing 42 Pa.C.S.A. 7341), appeal denied 784 A.2d 119, (Pa. 2001).

<sup>2</sup>In addition to the fee distribution system, the Agreement also provides for, *inter alia*, the following: selection and approval of *Castano* tobacco litigation actions; support for the litigation; access to a depository; new members; committees; time and expense reporting, review, and allocation; fee applications; and disbursement of funds. Pl’s Complaint, Exhibit A.

of plaintiffs' Complaint. Specifically, the Fee Committee, made up of members of the PLC, were to distribute fees according to the following factors:

(a) the time and monies expended... by each Attorney Member in prosecution of one or more actions within the Castano Tobacco Litigation solely as reflected on the Castano Depository Accounts...; (b) the perceived value with respect to the Castano Tobacco Litigation of each PLC Attorney Member; (c) the committees served upon by the various members; and (d) the standards for awarding fees set forth in the Manual for Complex Litigation.

Pl's Complaint, Exhibit A at 20-21. Plaintiffs argue that these factors were not applied properly.

Here, since plaintiffs sufficiently allege fraud in the process employed in reaching the fee allocation, this court does not lack subject matter jurisdiction. Specifically, plaintiffs allege that "instead of applying the mandatory criteria specified in the [Agreement], in particular, the criteria set out in the Manual for Complex Litigation, the Fee Committee made a recommendation in the absence of the necessary information that the Manual for Complex Litigation required to be considered." Pl's Reply Mem. of Law to Def's P.O. at 25-26. Furthermore, plaintiffs allege that because of this disregard of the factors enumerated in the Agreement, the proposed fee allocations "are not fair," "fail to account for the interests and contributions of plaintiffs," and "have resulted in self dealing and preferential treatment to defendants." Pl's Complaint at ¶ 89.

In summary, this court finds that since plaintiffs allege that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award, this court does **not** lack subject matter jurisdiction to review this Agreement.

## **II. The Preliminary Objection Asserting Insufficient Specificity In The Pleading of Fraud is Overruled.**

Defendants argue that plaintiffs' pleading of fraud lacks sufficient specificity. To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the allegations are

“sufficiently specific so as to enable [a] defendant to prepare [its] defense.” Smith v. Wagner, 403 Pa.Super. 316, 319, 588 A.2d 1308, 1310 (1991) (citation omitted). See also In re The Barnes Found., 443 Pa. Super. 369, 381, 661 A.2d 889, 895 (1995) (“a pleading should ... fully summariz[e] the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [a] cause of action is based”). Further, it is not necessary that the plaintiff identify the specific legal theory underlying the complaint. Burnside v. Abbot Laboratories, 351 Pa.Super. 264, 505 A.2d 973, 980 (1985)(citation omitted). Rather, it is the duty of the court to discover from the facts alleged in a complaint the cause of action, if any, stated therein. Burnside, 505 A.2d at 980. Moreover, this court recognizes the proposition that the Rules of Civil Procedure are to be liberally interpreted. Pa.R.C.P. 126.

“Fraud is a claim easily made but difficult to support. Once an allegation of fraud is injected into a case, even though it may ultimately be shown to be without any arguable merit, the whole tone and tenor of the matter changes.” New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa.Super. 537, 553 564 A.2d 919, 927 (1989). It “consists of anything calculated to deceive whether by single act or combination, or by suppression of truth, or suggestion of what is false whether it be by direct falsehood or by innuendo, by speech or silence, word of mouth, or look or gesture.” Delahanty v. First Pennsylvania Bank, NA 318 Pa.Super. 90, 107, 464 A.2d 1243, 1251 (1983) (citation omitted.)

It is true that the “breach of a promise to do something in the future is not actionable in fraud.” Shoemaker v. Commonwealth Bank, 700 A.2d 1003, 1006 (Pa.Super.Ct. 1997) (citations omitted). However, a statement of present intention made at the time of contracting, which is false when uttered may constitute a fraudulent misrepresentation of fact. Brentwater Homes, Inc. v. Weibley, 471 Pa. 17, 23, 369 A.2d 1172, 1175 (1977).

To establish a cause of action for fraudulent misrepresentation, the plaintiff must allege the following elements:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and
- (6) the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citation omitted). Further, “[t]he tort of intentional non-disclosure has the same elements as intentional misrepresentation ‘except in the case of intentional non-disclosure, the party intentionally conceals a material fact rather than making an affirmative misrepresentation.’” Id. See Restatement (Second) of Torts, § 550 (1976) (describing liability for fraudulent concealment). In addition, “[a] misrepresentation is material if it is of such character that had it not been made, or... had it been made, the transaction would not have been consummated.” Sevin v. Kelshaw, 417 Pa.Super. 1, 9, 611 A2d 1232, 1237 (1992).

Here, plaintiffs have fully summarized the material facts upon which their cause of action of fraud is based, enabling defendants to prepare a defense. Plaintiffs first allege that defendants represented to plaintiffs that an award of fees to be made by the Fee Committee would be based upon:

- (a) the time and monies expended... by each Attorney Member in prosecution of one or more actions within the Castano Tobacco Litigation solely as reflected on the Castano Depository Accounts...;
- (b) the perceived value with respect to the Castano Tobacco Litigation of each PLC Attorney Member;
- (c) the committees served upon by the various members; and
- (d) the standards for awarding fees set forth in the Manual for Complex Litigation.

Pl’s Complaint at ¶ 83. Plaintiffs relied upon these material representations in signing the Agreement. Plaintiffs allege that the representations “induced plaintiffs to rely upon the good faith and fiduciary duty that defendants owed to plaintiffs in connection with the fee payment provisions of the [Agreement].” Id. at ¶

88. Plaintiffs then allege that “defendants secretly, fraudulently and wrongfully have ignored those criteria and have made proposed fee allocations contrary to established law and to the detriment of plaintiffs.” *Id.* at ¶ 90. Moreover, plaintiffs claim defendants “have demonstrated self-dealing, preferential treatment to themselves, and a failure to abide by mandatory contractual provisions in the [Agreement].” Pl.’s Reply Mem. of Law to Def’s P.O. at 27. Plaintiffs further allege that the resulting unfair fee allocation was proximately caused by plaintiffs’ reliance upon defendants’ representations that there would be a complete and fair application of the fee allocation factors. Pl.’s Complaint at ¶ 90.

This court submits that, based on the facts alleged, the plaintiffs have stated an action for fraud with sufficient specificity to survive this Preliminary Objection.

### **III. The Preliminary Objection Asserting Legal Insufficiency of the Pleading is Overruled.**

Defendants also argue that plaintiffs’ pleadings for breach of contract, breach of fiduciary duty and fraud should be stricken for legal insufficiency.<sup>3</sup> For purposes of reviewing preliminary objections based upon legal insufficiency, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. *Tucker v. Philadelphia Daily News*, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). When presented with preliminary objections whose end result would be the dismissal of a cause of action, a court should sustain the objections only where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to

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<sup>3</sup>Having concluded that the pleading for fraud has been specifically pled, this court need now address only the issues as to the breach of contract and breach of fiduciary duty claims.

relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa.Super.Ct. 2000) (citations omitted). Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa.Super.Ct. 1999).

### **A. Breach of Contract**

Defendants contend that plaintiffs’ pleading of a breach of contract is legally insufficient. In Pennsylvania, three elements are necessary to properly plead a cause of action for breach of contract: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." CoreStates Bank, Nat’l Assn. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super.1999).

Here, plaintiffs sufficiently plead all three elements of breach of contract to survive a demurrer. To begin with, the plaintiffs properly plead the existence of a contract, including its essential terms. In their Complaint, plaintiffs aver that the Agreement, executed on January 1, 1994, was entered into by more than fifty law firms. Pl’s Complaint at ¶¶ 28, 29. Further, the essential terms are all properly pled, and specifically, plaintiffs clearly list the fee distribution factors, which they allege, the Executive Committee did not follow. Id. at ¶¶ 30 - 34, 60, 63, 64. Moreover, plaintiffs complain that by not applying the factors enumerated in the Agreement in determining the fee allocation, and by not permitting the inspection of documents relied upon by the Executive Committee in determining the fee allocation, defendants breached their contractual duty. Id. at ¶¶ 60, 66 - 69. As a result of this breach, plaintiffs allege damages in that their fee allocation was not determined by the agreed upon method. Id. at ¶¶ 60, 93.

Therefore, this court overrules this Preliminary Objection.

## **B. Breach of Fiduciary Duty**

Defendants also argue that the plaintiffs' pleading of breach of fiduciary duty is legally insufficient. Under Pennsylvania law, a fiduciary relationship exists "when one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side or weakness, dependence or justifiable trust, on the other." Commonwealth Dept. of Transp. v. E-Z Parks, Inc., 153 Pa.Commw. 258, 267, 620 A.2d 712, 717 (1993) (citations omitted). Black's Law Dictionary (6th Ed. 1990) defines fiduciary duty as "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of any duty implied by law." Id.

Here, this court finds that the plaintiffs' cause of action for breach of fiduciary duty survives a demurrer. Plaintiffs argue that the relationship among the signatories to the Agreement constitutes "a partnership and/or joint venture." Pl's Complaint at ¶¶ 71, 72, 73. Therefore, plaintiffs contend that defendants, as members of this partnership, breached their fiduciary duty to plaintiffs by "engaging in secret dealings, self dealings, and by their failure to disclose to plaintiffs, upon request, information requested by plaintiffs, which they have a right to inspect." Id. at ¶ 75. Specifically, plaintiffs allege that defendants "have allocated substantial sums of money to themselves in the form of a proposed fee award to the detriment of plaintiffs." Id. at ¶ 79.

This Preliminary Objection is, therefore, overruled.

## **CONCLUSION**

For the reasons discussed, the Preliminary Objections asserting the lack of subject matter jurisdiction and insufficient specificity and legal insufficiency of the Complaint are overruled. Defendants should answer the Complaint within twenty-two days of the date of this Opinion and Contemporaneous Order.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**